

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARCUS ANDREWS,
Petitioner,
v.
MIKE KNOWLES, Warden, et al.,
Respondents. } Case No. 10cv2109-BEN (BLM)
}
**ORDER DENYING WITHOUT
PREJUDICE PETITIONER'S MOTION
FOR RECONSIDERATION OF ORDER
DENYING APPOINTMENT OF
COUNSEL**
}[ECF No. 19]

On March 10, 2011, Petitioner, a state prisoner proceeding *pro se*, moved this Court to appoint counsel. Doc. No. 12. The Court denied his request on March 17, 2011, finding that Petitioner had failed to establish the requisite "exceptional circumstances" to justify appointment of counsel. ECF No. 14. Petitioner now seeks reconsideration of the Court's Order. ECF No. 19. In support of his motion, Petitioner presents additional facts and argument, which he contends provide justification for alteration of the Court's prior findings and warrant appointment of counsel. Id. at 1-3.

LEGAL STANDARD

Pursuant to Civil Local Rule 7.1(i)(1), a party may apply for reconsideration “[w]henever any motion or any application or petition for any order or other relief has been made to any judge and has been refused in whole or in part” CivLR 7.1(i)(1); see also United States v. Martin, 226 F.3d 1042, 1049 (9th Cir. 2000) (explaining that where reconsideration of a non-final order is sought, the district court has inherent jurisdiction to modify, alter, or revoke its earlier ruling). The party seeking reconsideration must show “what new or different facts and

1 circumstances are claimed to exist which did not exist, or were not shown, upon such prior
 2 application." CivLR 7.1(i)(1). Civil Local Rule 7.1(i)(2) permits motions for reconsideration within
 3 twenty-eight (28) days of the entry of the ruling sought to be reconsidered.

DISCUSSION

5 In his previous motion, Petitioner stated that he has a disability, but he did not provide
 6 any evidence in support of the alleged disability. See ECF No. 12. In his instant motion,
 7 Petitioner includes a declaration from a fellow inmate as well as numerous medication consent
 8 forms and physician's orders for medication. ECF No. 19 at 5-6, 19-33. Petitioner explains that
 9 the fellow inmate is "a jail house litigate whom has authored everything within [Petitioner's]
 10 Federal Writ and proceedings" (id. at 1), and the inmate himself avers that "[w]ithout my
 11 assistance [Petitioner] would not have been able to present this, Motion For Appointment Of
 12 Counsel, nor file his writ of habeus [sic] corpus . . ." (id. at 6). Petitioner further explains that
 13 this jail house litigate may soon be transferred, and Petitioner asserts that without the assistance
 14 of either the jail house litigate or counsel, he will be unable to further pursue habeas relief. Id.
 15 at 3. Petitioner also states that in addition to his "mental illness and low cognitive functions,"
 16 he "suffered and still suffers from severe side effects after attempting to quit his psychotropic
 17 medication 'cold turkey' in hopes to be cognitive enough to at the least achieve assistance in
 18 pursuing his post conviction relief." Id. at 2, 3.

19 As an initial matter, the Court notes that Petitioner's request for reconsideration is
 20 untimely, as more than twenty-eight days have passed since the Court denied his first request.
 21 See CivLR 7.1(i)(2). However, in light of Petitioner's *pro se* prisoner status and in the interest
 22 of justice, the Court will consider the request on the merits.

23 As this Court explained in its March 17, 2011 Order, a state prisoner has no Sixth
 24 Amendment right to the assistance of counsel in federal habeas proceedings. See McCleskey v.
 25 Zant, 499 U.S. 467, 495 (1991); see also Nevius v. Sumner, 105 F.3d 453, 459 (9th Cir. 1996);
 26 Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir. 1986). However, courts may appoint counsel
 27 for financially eligible habeas petitioners seeking relief pursuant to 28 U.S.C. § 2254 whenever
 28 the court "determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B);

1 Terrovona v. Kincheloe, 912 F.2d 1176, 1181 (9th Cir. 1990) (citing 18 U.S.C. § 3006A(a)(2)(B)).
 2 In the Ninth Circuit, “[i]ndigent state prisoners applying for habeas corpus relief are not entitled
 3 to appointed counsel unless the circumstances of a particular case indicate that appointed
 4 counsel is necessary to prevent due process violations.” Chaney, 801 F.2d at 1196. A due
 5 process violation may occur in the absence of counsel if the issues involved are too complex for
 6 the petitioner. See Bonin v. Vasquez, 999 F.2d 425, 428-29 (9th Cir. 1993).

7 The court’s discretion to appoint counsel may be exercised only under “exceptional
 8 circumstances.” Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991).¹ “A finding of
 9 exceptional circumstances requires an evaluation of both the likelihood of success on the merits
 10 and the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the
 11 legal issues involved. Neither of these factors is dispositive and both must be viewed together
 12 before reaching a decision.” Id. (citations and internal quotation marks omitted).

13 Having reviewed Petitioner’s additional factual assertions and arguments, the Court finds
 14 that they do not present a basis for reversing its prior decision. The thrust of Petitioner’s
 15 argument is that he requires the assistance of counsel because he is mentally incompetent and
 16 incapable of understanding how to proceed with presenting his case. ECF No. 19 at 3. However,
 17 the facts do not support Petitioner’s allegation that he is unable to litigate this matter on his own.
 18 The trial court did not find Petitioner incompetent to stand trial and Petitioner provides no
 19 documentation from a physician regarding the level of his mental functioning. Although
 20 Petitioner provides medication consent forms and physician’s orders for medication, no
 21 documents detail precisely why or for what mental illness(es) Petitioner has been prescribed
 22 these medications. Similarly, although Petitioner asserts that he suffers side effects from his
 23 medications, the Court is uncertain as to what medications, if any, Petitioner is currently taking
 24 because only two of the medication-related documents Petitioner submitted are from 2011 (id.
 25 at 19-20) and Petitioner himself indicates that he may have quit taking his medication (id. at 2).

26 Additionally, this Court again reviewed Petitioner’s typed petition and still finds that

28 ¹ The Terrell court cited 28 U.S.C. § 1915(d), but the legislature subsequently renumbered this section as
 28 U.S.C. § 1915(e)(1).

1 Petitioner adequately presented his arguments and the issues are not so complex that failure to
 2 appoint counsel is likely to result in due process violations. See Bonin, 999 F.2d at 428-29. That
 3 is, regardless of whether or not Petitioner has consistently obtained assistance from a "jail house
 4 litigate," Petitioner has adequately articulated his claims *pro se* such that this Court can discern
 5 both the factual and legal bases for his claims. Moreover, to the extent that any ambiguity as
 6 to Petitioner's claims exists, the Court notes that Petitioner presented the same four claims to
 7 the California Court of Appeal and/or the California Supreme Court with the assistance of
 8 counsel. ECF No. 4 at 2-3, 7-11. The Court need not appoint counsel when the Court can
 9 determine the merits based upon the existing state court record. See Knaubert v. Goldsmith,
 10 791 F.2d 722, 729 (9th Cir. 1986) (per curiam) (concluding that when a court properly declines
 11 to hold an evidentiary hearing, the court's denial of a motion to appoint counsel does not amount
 12 to a denial of due process).

13 **CONCLUSION AND ORDER**

14 The Court continues to conclude that Petitioner's submissions have shown an adequate
 15 grasp of the legal issues in this case and Petitioner has not demonstrated that the matters are
 16 so complex that a due process violation would result. See Bonin, 999 F.2d at 428-29. The Court
 17 also finds that while Petitioner has asserted sufficient facts to state a claim for federal habeas
 18 relief, he has not established a likelihood of success on the merits. See Terrell, 935 F.2d at 1017.
 19 Under such circumstances, a district court does not abuse its discretion in denying a state
 20 prisoner's request for appointment of counsel as it is simply not warranted by the interests of
 21 justice. See LaMere v. Risley, 827 F.2d 622, 626 (9th Cir. 1987) (affirming district court's denial
 22 of request for appointment of counsel where pleadings demonstrated petitioner had "a good
 23 understanding of the issues and the ability to present forcefully and coherently his contentions").
 24 Accordingly, Petitioner's motion for reconsideration and for appointment of counsel is **DENIED**
 25 without prejudice.

26 **IT IS SO ORDERED.**

27 DATED: June 1, 2011

28 BARBARA L. MAJOR
United States Magistrate Judge